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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT SPRAGUE, Plaintiff and Respondent, v. CURTIS KEKOA, JR., Defendant and Appellant.	A122018 (San Francisco County Super. Ct. No. CGC06-458777)

Pursuant to a written agreement, respondent Robert Sprague provided legal services to appellant Curtis Kekoa, Jr. in a dissolution proceeding commenced against Kekoa by his wife. The jury awarded Sprague damages in the amount of $219,221.75 for breach of contract, plus interest thereon of $30,931.28.

The focus of Kekoa's appeal is the pretrial grant of Sprague's motion for judgment on the pleadings on Kekoa's first amended cross-complaint alleging causes of action against Sprague for legal malpractice, breach of fiduciary duty, intentional infliction of emotional distress and breach of contract. Finding that Kekoa's cross-complaint failed to allege facts sufficient to state any cause of action, the court granted Sprague's motion. With respect to Kekoa's causes of action for malpractice and breach of fiduciary duty, the court concluded that Sprague did not have the requisite duties because the relationship between the parties was not that of attorney-client, as Kekoa maintained, but that of employer-employee.

We shall affirm the judgment. Finding that Kekoa's appeal and other pleadings in this court were designed to harass and delay and are therefore "frivolous" within the

meaning of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650 (*Flaherty*), and also because Kekoa repeatedly violated the Rules of Court and sought to introduce numerous matters not material to this appeal, thereby significantly prolonging this appeal and rendering it far more difficult to process than it should have been, we shall impose sanctions on Kekoa and his appellate counsel, Armen L. George. We shall also declare Kekoa a vexatious litigant. (Code Civ. Proc., § 391.)

FACTS AND PROCEEDINGS BELOW

The pertinent facts all relate to a bitter and extraordinarily protracted marital dissolution action commenced against Kekoa by his wife in 2003.

Kekoa is a licensed attorney in California, Pennsylvania and Hawaii, who was employed for many years as a commercial airline pilot. Between 1991 and 2007, he represented himself in at least 14 trial court cases and numerous appellate proceedings in California. He also represented himself in the trial court during various phases of the present case and the underlying dissolution action and several related cases.

In April 2006, Kekoa discharged Cindy Lee, the attorney then representing or assisting him in the dissolution case filed by his wife. Prior to Lee's discharge, Kekoa had obtained legal assistance from a series of other lawyers, including Sprague, who was then working as a "contract attorney" through an organization known as "Attorney Assistance." Kekoa was billed for Sprague's work by Attorney Assistance, which paid Sprague an hourly wage for the work he performed for Kekoa.

Shortly after Kekoa discharged Lee, he entered into a direct relationship with Sprague pursuant to a one-page "Independent Contractor Agreement" dated April 22, 2006. The agreement states that Kekoa wants Sprague "to assist or represent him" in the dissolution case and the two related actions. A provision drafted and insisted upon by Kekoa specifies that "[a]ll control and decision-making in said matters shall be retained by Client, whose decisions are final on procedural as well as substantive matters." Kekoa felt this provision necessary to "clarify" his "rights to control the litigation." When asked at deposition whether the Independent Contractor Agreement and, more specifically, the

control provision, was a form he ordinarily used, Sprague said it was not and that the form was "highly customized and unique to Mr. Kekoa's circumstances."

A section of the agreement relating to fees and costs provides that $20,000 shall be deposited with Sprague as a fee advance, his fee shall be $175 per hour, Sprague may hire a "paralegal/consultant" whose fee shall be $95 per hour, and all fees of Sprague and the paralegal he hires incurred after exhaustion of the $20,000 deposit shall be paid to Sprague at the end of the marital dissolution case. The last paragraph of this section of the contract states that "Attorney is not expected, as an independent contractor, to incur significant costs, but Attorney shall be reimbursed for all reasonable costs incurred."

The claims set forth in Kekoa's cross-complaint appear to be based primarily on alleged injuries resulting from Sprague's June 27, 2006 stipulation (on behalf of Kekoa) that San Francisco Superior Court Commissioner Marjorie A. Slabach could serve as judge pro tem in the dissolution proceeding, and Sprague's alleged "refus[al] to diligently try to right his wrong" in making that stipulation. The making of the stipulation and Sprague's failure to have it vacated are evidently also the reason Kekoa and Sprague terminated their relationship in at the end of November 2006, and Kekoa refused to pay Sprague the amounts he seeks in the present action. At the time he was discharged, Sprague claimed he had rendered Kekoa services worth $265,109.25 pursuant to the terms of the agreement, but had received only $45,887.50 of that amount. Kekoa believed that "$50,000-$100,000" of the total amount Sprague claimed was "unjustified."

The fee dispute was submitted to nonbinding arbitration in accordance with the Rules of Procedure of the Bar Association of San Francisco. (See Bus. & Prof. Code, §§ 6200-6206.) The matter was heard on March 9, 2007, before three arbitrators. After conducting a hearing, the arbitrators concluded "that the total amount of fee[s] and/or costs which should have been charged in this matter is $222,645.25," of which Kekoa had paid only $45,887.50." Accordingly, after deducting $2,500 to cover half the arbitration fee, the arbitrators awarded Sprague $174,257.75.

Considering the award inadequate, Sprague elected to reject it. On May 11, 2007, he filed a first amended complaint alleging causes of action for breach of the agreement, quantum meruit, open book account, and account stated.

Kekoa filed his cross-complaint about a month later and Sprague answered it the next day, alleging 14 affirmative defenses.

On April 17, 2008, Sprague moved for judgment on the pleadings on the ground the cross-complaint failed to state facts sufficient to constitute any cause of action. With respect to the cause of action for breach of contract, Sprague maintained that Kekoa's allegations (*viz*., that "Sprague demanded more money upfront than set forth in the contract else he would not perform[;] Kekoa said that he was not obligated to pay beyond that set forth in the contract and did not") failed to allege how Kekoa was damaged as a result of the purported breach. With respect to the cause of action for intentional infliction of emotional distress, Sprague claimed Kekoa failed to allege outrageous conduct, severe emotional distress, intentional conduct or at least reckless conduct.

Sprague maintained that Kekoa's causes of action for professional negligence and breach of duty failed to allege and he could not show that any such duties arose out of the Independent Contractor Agreement. This contention, upon which the trial proceedings focused, was that Kekoa's causes of action for legal malpractice and breach of fiduciary duty were based on the erroneous assumption that the parties' agreement created an attorney-client relationship. In Sprague's view, the "control provision" in the agreement made the relationship between the parties that of employer and employee, which did not impose on him any fiduciary duty. Sprague contended he "could no more be sued for malpractice by Kekoa than an associate at a Wall Street law firm can be sued by his employer for legal malpractice." Sprague maintained that while the statement in the agreement that Kekoa wanted to engage Sprague "to assist or represent him" in the three specified proceedings was ambiguous as to whether the services Sprague was called upon

to deliver under the agreement constituted legal assistance or legal representation, any ambiguity was eliminated by the control provision.[1]

Agreeing with all of Sprague's contentions, the trial court granted judgment on the pleadings with respect to the entire cross-complaint. The court found that Kekoa's claims of legal malpractice and breach of fiduciary duty were foreclosed by the fact that Sprague was acting as an employee. Kekoa could not prevail on his breach of contract claim, the court concluded, because it "[did] not allege facts sufficient to state a cause of action for breach of this contract of employment establishing an employer-employee relationship," and also because "the damages allegations are vague, speculative and not provable." The court also appears to have agreed with Sprague that Kekoa's claim of intentional infliction of emotional distress was unsustainable due to his failure to allege outrageous conduct, severe emotional distress, intentional conduct or at least reckless conduct, and causation and damages. Kekoa was not prevented from amending the cross-complaint, but did not do so.

The order granting Sprague judgment on the pleadings also stated that it "does not eliminate Kekoa's defenses to plaintiff's action. If Sprague did not perform the work, he would not be entitled to wages for hours of work that he did not do. However, the issues are narrowed in that there will not be any testimony regarding the dissatisfaction of the work [*sic*]. The issue will be merely was the work performed."

The order additionally found that Monica Blake was the "paralegal/consultant" Sprague was authorized by the contract to hire at a wage of $95 per hour, that she was also Kekoa's employee, and that her work assisting Sprague "shall be included along with plaintiff Sprague's work as part of the recovery in this particular action on the First Amended Complaint." In making this finding, the court rejected Kekoa's contentions that Blake was never shown to be qualified to perform the work of a paralegal and that, in

[1] Because Sprague's motion was for judgment on the pleadings, neither party presented extrinsic evidence bearing upon the nature of the services Sprague actually provided Kekoa.

any event, he "never directed [her] to perform any work" and his relationship was only with Sprague, and that his obligation, if any, should therefore only be to Sprague.

Trial commenced on April 24, 2008, and the jury returned a verdict the same day.[2] The jury concluded that Sprague performed work for Kekoa, that Kekoa owed Sprague wages under the terms of the employment, and that the amount of unpaid wages was $219,221.75, precisely the amount Sprague sought. Notice of entry of judgment in that amount was filed on April 29, 2008.

On May 12, 2008, Sprague moved for an award of reasonable attorney fees under Business and Professions Code section 6204, subdivision (d), which provides for a discretionary award of such fees to a party who seeks a trial after an attorney fee arbitration and obtains a judgment more favorable than the arbitration award. Sprague contended that fees in the amount of "at least" $110,485.50 were justified and reasonable. At the June 6, 2008 hearing on the motion for attorney fees, the court awarded Sprague $73,657 in attorney fees.

At the close of the hearing on attorney fees, Kekoa orally moved to stay enforcement of the attorney fee award, which the court denied.

On May 23, 2008, prior to the award of attorney fees, Kekoa moved for new trial on the ground of an "[i]rregularity in the proceedings of the court." According to Kekoa, "[t]he court's irregularity was the dismissal of [his] entire cross-complaint for professional malpractice, breach of fiduciary duty and intentional infliction of emotional distress and for breach of contract, although there was 'conflicting evidence' as to whether there was an attorney-client relationship. In addition, the court refused to provide a Statement of Decision after [his] request." (Fns. omitted.) Pointing out that Kekoa's contention that the relationship between the parties was that of attorney and client had previously been made and rejected, and that a statement of decision is not

[2] The trial court having concluded that the agreement between the parties was an employer-employee contract as a matter of law, Sprague elected to proceed only on his first cause of action for breach of contract, rendering moot his three remaining causes of action.

called for in connection with a legal ruling, the court denied the new trial motion on June 20, 2008.

Timely notice of appeal was filed on June 11, 2008.

PROCEEDINGS IN THIS COURT

On July 30, 2008, Sprague filed a motion in this court requesting that we declare Kekoa a vexatious litigant and require him to furnish security, and for judicial notice of materials offered in support of that motion. We denied this request without prejudice to Sprague filing a motion for sanctions for filing a frivolous appeal, but granted the request for judicial notice because the materials in question related to the appeal as well as the issue of sanctions.

On October 28, 2008, Kekoa petitioned this court for a writ of supersedeas staying enforcement of the judgment pending disposition of this appeal. Kekoa claimed entitlement to such relief on the grounds that the judgment and award of damages were "the product of patent judicial error, arbitrary and/or capricious action, bias and/or prejudice, acts(s) without jurisdiction, violations of Kekoa's federal and California constitutional rights, abuse of discretion and/or violations of Kekoa's civil rights by the San Francisco Superior Court, and of apparent fraud." We summarily denied the petition on October 30, 2008.

On May 1, 2009, less than 10 days after Kekoa filed his appellant's reply brief, Sprague filed a motion in this court for an award of sanctions against Kekoa and his appellate attorney, Armen L. George, for filing a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.[3]) Sprague requested an award of "at least $100,000" against Kekoa and a separate award of "at least $30,000" against his counsel. Also on May 1, 2009, Sprague requested that we take judicial notice of various materials offered in support of the request for such sanctions, which we granted. Pursuant to the Rules of Court, on June 11, 2009, we advised Kekoa we were considering imposing monetary sanctions against him and his appellate attorney, as Sprague requested, and

[3] All further rule references are to the California Rules of Court.

authorized him to file a brief opposing sanctions within 10 days of our notice. (See rule 8.27(c), (d).)

Meanwhile, on June 9, 2009, this court received Kekoa's motion for sanctions against Sprague in the amount of "at least $7,200" and filed his motion to augment the record. On June 12, 2009, we denied permission to file Kekoa's motion for sanctions as untimely because it was not filed within 10 days after appellant's reply brief was due, as required by the California Rules of Court. (Rule 8.276(b)(1).) We now grant Kekoa's motion to augment the record because the augmentation relates to the appeal, not just to Kekoa's motion for sanctions against Sprague.

In a letter filed with the court on June 19, 2009, Kekoa sought reconsideration of our denial of permission to file his motion for sanctions. Pointing out that his motion was based on the frivolousness of Sprague's motion for sanctions, Kekoa claimed that denial of his motion as untimely amounts to a "de facto holding that [Sprague is] free without consequence to file a frivolous motion for sanctions," and that this "is fundamentally unfair and violates both Kekoa's constitutional rights to due process and equal protection." Treating Kekoa's motion for sanctions as opposition to Sprague's motion for sanctions, as he requested, we rejected Kekoa's arguments. As we shall later explain (see discussion, *post*, at pp. 28-30), Kekoa's motion for sanctions was not genuinely based on the frivolousness of Sprague's *motion*, as he claimed, but on the alleged frivolousness of Sprague's legal position at trial and on this appeal which, as we later explain, is not a proper ground upon which an appellant may seek sanctions.

On July 16, 2009, Attorney George faxed the members of this panel a four-page single-spaced typewritten letter requesting that we strike from our July 9, 2009 order the language characterizing Kekoa's late motion for sanctions as "frivolous," which George characterized as "patently false" and claimed would constitute "libel *per se* if not privileged matter."[4] Claiming our "rule 8.276(d) letter [of] June 11, 2009," which issued

[4] George did not file the letter with the clerk but faxed it directly to members of the panel, explaining that "I should not have to file and await the determination of a

"before Mr. Kekoa had been afforded any opportunity to respond to Mr. Sprague's moving papers" shows that this court "had already decided the sanctions issue [in favor of Sprague] in violation of Mr. Kekoa's rights to due process and equal protection,"[5] Attorney George additionally stated that "in the interest of justice and to preserve the appearance of impartiality and fairness," and pursuant to the Code of Judicial Ethics, "I hereby (on behalf of myself and Mr. Kekoa) request this panel disqualify itself and that this appeal be assigned to another panel for determination of all issues now before this Court," citing *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933.

Treating the July 16th letter as a motion, we issued an order on July 20, 2009, denying both the request to strike from our July 9, 2009 order the language to which Kekoa objected and his request that we disqualify ourselves and transfer this appeal to another division of this court.

On September 15, 2009, the day on which oral argument was held on this appeal and on Sprague's motion for sanctions, Kekoa filed with the clerk of the court a request for judicial notice of transcripts of proceedings on August 2009 in the ongoing dissolution case (*Sagonowsky v. Kekoa* (2003) Super. Ct. S.F., No. FD1-03-755091), in which Commissioner Slabach was still presiding.

At the close of oral argument, we deferred submission of the appeal and Sprague's motion for sanctions. Sprague was given 20 days to respond to Kekoa's late request for judicial notice.[6] We also advised Sprague's counsel, N. Lee Ormasa, that information

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motion to redress an error—apparent from a complete reading of this Court's Docket—that should never have been made."

[5] Rule 8.276(d) provides that opposition to a motion for sanctions "may not be filed" except within 10 days of notice from the court that it is considering imposing sanctions. In other words, what Kekoa refers to as a "rule 8.276(d) letter" is therefore *by definition* sent prior to the time a party against whom sanctions is sought is afforded any opportunity to respond to the moving papers.

[6] We hereby deny Kekoa's request for judicial notice as untimely and also because it relates to an irrelevant matter; namely, statements made by Commissioner Slabach in an August 5, 2009 hearing (held more than a year after Kekoa filed his notice of appeal herein) allegedly indicating she was biased against him at the time Sprague stipulated to

regarding the time he spent working on this appeal and matters related to the appeal, which he offered in support of his request for sanctions were inadequate, and granted him seven days within which to provide a more detailed accounting.

We also granted Sprague leave to renew his July 30, 2008 motion to declare Kekoa a vexatious litigant. The appellate record had not been filed at the time we denied that motion and we were not then fully aware of the information contained in the voluminous record later filed with the court. Sprague filed a new motion to declare Kekoa a vexatious litigant on September 17, 2009.

Several days before his response to that motion was due, Kekoa sought an extension of time to October 16, 2009 to file his opposition, which we granted.

Within the additional time allowed, Kekoa filed a 61-page document entitled "[APPELLANT'S] REQUEST THIS PANEL RECUSE ITSELF; REQUEST FOR A FURTHER EXTENSION OF TIME; OPPOSITION TO MOTION TO DEEM APPELLANT A VEXATIOUS LITIGANT (INCLUDING OBJECTIONS TO INADMISSIBLE EVIDENCE); REQUEST FOR SANCTIONS; PERMISSION TO FILE SANCTIONS MOTION; REQUEST FOR ORAL ARGUMENT (As Against Respondent and His Counsel, Jointly and Severally, of at Least $24,000.)" Kekoa filed two documents in support of this pleading: (1) the declaration of one of his former attorneys, Cindy Lee, to which three lengthy exhibits were attached, and (2) four exhibits in support of Kekoa's opposition to Sprague's motion to declare him a vexatious litigant and Kekoa's other requests.

On October 23, 2009, we filed an order (1) denying Kekoa's second request for us to recuse ourselves; (2) denying his request for permission to file a motion to impose sanctions on Sprague; (3) granting his request for a second extension of time to cure "omissions and errata" in the portion of his pleading opposing Sprague's motion to

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her participation in that case. The comments made by Commissioner Slabach that Kekoa sees as demonstrating her bias referred to both Kekoa and his wife, not just Kekoa, and reflect no more than the frustration felt by a judicial officer confronted by what she considered "the most horrendous case ever."

declare him a vexatious litigant; and (4) granting his request for oral argument on Sprague's motion to declare him a vexatious litigant.

On October 29, 2009, Kekoa filed an amended opposition to the motion to declare him a vexatious litigant but, believing it too could be improved, requested a third extension of time within which to strengthen it, and also requested a continuance of the date for oral argument. On November 2, 2009, we issued an order denying both requests.

On November 17, 2009, the court heard oral argument on Sprague's motion to declare Kekoa a vexatious litigant. Before commencing his argument, George presented the clerk's office a "Renewed [i.e., third] Request the Panel Recuse Itself" together with a declaration of Curtis Kekoa, Jr., in support of that request.[7] The request included three exhibits,[8] and Kekoa's declaration included 28 exhibits.[9] Counsel for Sprague opposed the requests and waived the right to file written opposition. By order dated November 20, 2009, we allowed the late filing of these pleadings and denied the requests for recusal and a further extension of time.[10] (The reasons for our denials of Kekoa's repeated

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[7] Kekoa's recusal requests are made pursuant to sections 170.1 and 170.3 of the Code of Civil Procedure, as well as under the California Code of Judicial Ethics. We have assessed the requests pursuant to the criteria set forth in Canon 3(E)(4) of the California Code of Judicial Ethics.

[8] The first exhibit is a letter dated September 23, 2009, to Kekoa's counsel, George, advising that a balloon payment on his home mortgage would be due on November 1, 2009; the second exhibit is a letter from George to the State Bar dated June 18, 1996, responding to the request of a Fresno County Superior Court Judge for a bar investigation of whether George's conduct in that court was ethical; and the third exhibit is a transcript of the September 15, 2009 oral argument in this appeal.

[9] All but two of these exhibits (Kekoa's complaint to the State Bar regarding the attorney then representing his wife in the dissolution case, and Attorney George's curriculum vitae) are documents filed by Kekoa in the dissolution proceeding or relate to that proceeding.

[10] Because the third recusal request included the complaint that the orders denying Kekoa's first two recusal requests were signed only by Presiding Justice Kline, and did not explicitly state that he was authorized to speak also on behalf of Justices Haerle and Lambden, the order denying Kekoa's third request included the following statement: "As was the case when we denied the recusal requests filed by appellant on July 17 and October 16, 2009, each member of the panel has again individually decided that: (1) his

motions to disqualify this panel and to transfer the appeal to another division of this court are described, *post*, at pp. 30-34.)

DISCUSSION

I.

The Appeal

A.

Preliminarily, Kekoa's rambling briefs, which are far more polemical than substantive, do not coherently identify the precise legal issues he purports to present. [11] The numerous "issues" he purports to address are really no more than 15 lengthy and highly tendentious rhetorical questions followed by flippantly self-serving "answers." Moreover, many of the so-called "issues" and "answers" relate to matters never raised below.[12] To the extent Kekoa perfunctorily raises such claims without developing them

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recusal would not serve the interests of justice; (2) he does not doubt his capacity to be impartial; (3) the circumstances of this case are not such that a reasonable person aware of the facts would doubt the justice's ability to be impartial; and (4) there is no other factor warranting his disqualification." (Cal. Code Jud. Ethics, Canon 3(E)(4).)

[11] Kekoa's briefs also refer to numerous matters for which citations to the record are not provided and to evidence never presented to the trial court or made a part of the record in this appeal, in violation of rule 8.204(a), and the citations to the record Kekoa does make do not always support and sometimes contradict the claims they assertedly support. His opening brief also includes an exhibit containing material never made a part of the appellate record, which violates rule 8.204(d). This is not the first time Kekoa has relied upon matters not in the record. In one of his appeals from the imposition of sanctions in the dissolution case, Division Five of this Court repeatedly called attention to Kekoa's references to pleadings and exhibits he neglected to make a part of the record. (*Sagonowsky v. Kekoa* (Oct. 26, 2007) No. A116818 [unpub. opn.] at p. 8, fn 3, and p. 13, fn. 4.) Had Sprague moved to strike the opening brief for failure to comply with the Rules of Court, as he should have, we would have stricken the brief. We have elected not to strike Kekoa's briefs at this late date on our own motion because the legal issue presented is relatively simple, Sprague filed an answering brief, and this litigation has already consumed far more time than it should have.

[12] To take just one example, at the end of his opening brief Kekoa describes as "dumbfounding" Judge Woolard's finding that Monica Blake (the "paralegal/consultant" Sprague was contractually authorized to hire) was Kekoa's employee, and her work would be included along with Sprague's as part of the recovery sought in the action.

in his briefs and, indeed, without even a clear indication that they are intended to be discrete appellate contentions (as appears to be his habit),[13] they are not properly made, and are rejected on that basis. (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2, citing *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

The only argument sufficiently identified and developed to be cognizable relates to the trial court's rejection of the claims in Kekoa's cross-complaint that Sprague's conduct in the dissolution proceedings—particularly his stipulation that Commissioner Slabach could serve as judge pro tem—constituted legal malpractice and breach of a fiduciary duty. Kekoa's briefs completely ignore the grounds upon which Sprague challenged Kekoa's cross-claims for breach of contract and intentional infliction of emotional distress, which the trial court adopted in granting judgment on the pleadings.[14]

According to Kekoa, Ms. Blake "was not qualified to be a paralegal" and served merely as a "secretary," and "is not magically entitled to collect $95.00 per hour simple [*sic*] because she/he is called a 'paralegal/consultant.' " Furthermore, Kekoa, says, "it doesn't take both an attorney and a paralegal to prepare a witness in a divorce proceeding." However, the record does not show Kekoa ever objected to Ms. Blake's employment by Sprague, nor questioned her qualifications or the nature and quality of the work she performed in the case, which was described by Sprague and Blake in detail in their testimony at trial. Kekoa made no reference to Blake during his trial testimony.

[13] In 2007, considering one of Kekoa's appeals from rulings in the dissolution case, Division Five also refused to address certain of his claims of error because they were not "sufficiently developed to be cognizable." (*Sagonowsky v. Kekoa* (Oct. 26, 2007) No. A113883 [unpub. opn.] at p. 11, fn. 5, citing *Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1214, fn. 4.)

[14] Kekoa's opening brief sums up the gravamen of the cross-complaint as follows: "Rather than diligently represent Kekoa's interests in the Divorce Proceedings, Sprague, after receiving more than $45,000 from Kekoa, began a passive-aggressive campaign designed to get himself terminated" by "refus[ing] to diligently try to right his wrong in stipulating to Commissioner Slabach serving as a judge pro tem and dragging his feet on discovery and other matters in the Divorce case, [thereby] compromising the prosecution of Kekoa's claims as well as his defenses—violating his [Sprague's] ethical obligations . . . and his obligations under the ICA [Independent Contractor Agreement], forcing Kekoa to do more of his own legal work, which subjected Kekoa to tremendous

B.

The title "Independent Contractor Agreement" and the statement therein that "Attorney is not expected, *as an independent contractor*, to incur significant costs, but Attorney shall be reimbursed for all reasonable costs incurred" (italics added), facially suggest, of course, that the relationship created is that of independent contractor, not that of employer-employee. On the other hand, the legal significance of the title and reference to the parties as "Attorney" and "Client" pales in comparison to that of the provision stating that "[a]ll control and decision-making in said matters shall be retained by Client, whose decisions are final on procedural as well as substantive matters." Such a comprehensive provision is entirely incompatible with an independent contractor relationship and strongly indicative of an employment relationship.

As the case law makes clear, the label of the agreement is not controlling on the question whether it establishes an independent contractor or employer-employee relationship. (*Estrada v. FedEx Ground Package System, Inc*. (2007) 154 Cal.App.4th 1, 10-11.) It is equally clear that "[t]he most significant factor tending to show employment is the right of the employer to control the details of the work; conversely, freedom from that control tends to establish the relationship of independent contractor." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 23. pp. 62-63, citing, inter alia, Rest.2d, Agency § 220(2)(a); *Green v. Soule* (1904) 145 Cal. 96, 99; *Tieberg v. Unemployment Ins. App. Bd*. (1970) 2 Cal.3d 943, 946; *Housewright v. Pacific Far East Line* (1964) 229 Cal.App.2d 259, 267; *St. Paul Ins. Co. v. Industrial Underwriters Ins. Co.* (1989) 214 Cal.App.3d 117, 122; *Toyota Motor Sales U.S..A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 873; *Millsap v. Federal Express Corp*. (1991)

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stress." The only authorities Kekoa cites for these statements are Business and Professions Code section 6106, rule 3-110 of the Rules of Professional Conduct, and *Alkow v. State Bar* (1971) 3 Cal.3d 924. Kekoa's briefs not only ignore the grounds upon which the trial court granted judgment on the pleadings with respect his causes of action for breach of contract and intentional infliction of emotional distress, but also fail to identify any injurious act on the part of Sprague other than his refusal to challenge Commissioner Slabach's participation in the dissolution proceeding**.**

227 Cal.App.3d 425, 431; accord, *Randolph v. Budget Rent-A-Car* (9th Cir. 1996) 97 F.3d 319, 325 ["[u]nder California law, whether a person is an employee depends on the degree of control the purported employer has a right to exercise over that person. [Citation.] Where the purported employer has the right to control the mode and manner of doing work, the employer-employee relationship exists"].)

Moreover, "[i]t is not the control actually exercised, but the control that may be exercised, i.e., the right of control, that determines the issue of employment or independent contractor relationship." (3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 24, p. 64.)

Sprague's contention below and here that the relationship between Kekoa and him was that of employer and employee is based primarily on section 4304-1 of title 22 of the California Code of Regulations, which the trial court explicitly relied upon. That regulation simply requires that the Employment Development Department's [EDD] definition of an "employee" be in accordance with the common law definition. Accordingly, section 4304-1 states: "Whether an individual is an employee . . . will be determined by the usual common law rules applicable in determining an employer-employee relationship. Under those rules, to determine whether one performs services for another as an employee, the most important factor is the right of the principal to control the manner and means of accomplishing a desired result. *If the principal has the right to control the manner and means of accomplishing the desired result, whether or not that right is exercised, an employer-employee relationship exists*. Strong evidence of that right to control is the principal's right to discharge at will, without cause." (Italics added.) The section goes on to say that "[i]f it cannot be determined whether the principal has the right to control the manner and means of accomplishing a desired result," 10 other enumerated factors "will be taken into consideration."[15] (Cal. Code

[15] Including, as examples, "[w]hether or not the one performing the services is engaged in a separately established occupation or business"; "[t]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision"; "[t]he skill required in performing the services and

Regs., § 4304-1, subd. (a).) However, section 4304-1 makes clear, as does a large body of case law, that where, as here "there is independent evidence that the principal has the right to control the manner and means of performing the service in question it is not necessary to consider" any of the 10 enumerated factors that might otherwise be considered. (Cal. Code Regs., § 4303-1, subd. (b).)

The definition of the employer-employee relationship set forth in section 4304-1 is by its own terms merely declarative of the common law rule applicable in this jurisdiction, which uniformly instructs that, though there are " 'secondary' indicia" of the nature of a service relationship that may sometimes be considered, "the right to control work details is the 'most important' or 'most significant' consideration" (*S. G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350), and that where the mere right of the principle to exercise such control is clearly established, resort to other factors is unnecessary. The substance of section 4304-1, subdivision (a), really does little more than track the language set forth by our Supreme Court in *Tieberg v. Unemployment Ins. App. Bd., supra*, 2 Cal.3d 943, 949 [" 'If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all the details, an employer-employee relationship exists' "].)

In arguing that the relationship between him and Sprague cannot be deemed that of an employer and employee, Kekoa maintains that, if a litigant such as he cannot hold his legal counsel liable for malpractice or breach of a fiduciary relationship, the attorney-client relationship indispensable to our justice system will collapse. The claim is indifferent not just to the fact that Kekoa is a licensed attorney in this and other states who has frequently represented himself in legal proceedings and supervised the work of attorneys engaged to assist him, but also to the control clause, which is an exceedingly

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accomplishing the desired result"; "[w]hether or not the parties believe they are creating the relationship of employer and employee"; and "[t]he extent of actual control exercised by the principal over the manner and means of performing the services." (Cal. Code Regs., § 4304-1, subd. (a)(1), (2), (3), (8), (9).)

unconventional provision in a fee agreement.[16] Kekoa's insistence on this provision—which according to Sprague was "highly customized and unique to Mr. Kekoa's circumstances"—can only reflect a belief he was better able to make the necessary judgment calls than the attorney he hired to assist him, even with respect to procedural matters clients traditionally leave to counsel.

Kekoa has never explained how he can have it both ways; that is, contractually reserve the right to completely control all aspects of Sprague's legal assistance and yet retain the right to hold him liable for legal malpractice or breach of a fiduciary duty. The right of an attorney to completely control all aspects of the work of another attorney he employs to assist him necessarily implies the duty to closely supervise the performance of the attorney employed. (*Moore v. State Ba*r (1964) 62 Cal.2d 74, 80-81; *Jenifer v. Fleming, Ingraham & Floyd, P.C.* (S.D. Ga.) 552 F.Supp.2d 1370; see also 1 Mallen & Smith, Legal Malpractice (2009 ed.) § 5.8, at p. 662 ["managing attorney[] is responsible for the efficiency and conduct of employed attorneys and . . . may be liable for failing to adequately supervise the work of an associate attorney"]; see also *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2007) 150 Cal.App.4th 384.) Thus, if the work of an associate attorney constitutes professional negligence it is ordinarily attributable to the errors and omissions of the employing attorney who controls his or her conduct.

Although Sprague relies almost entirely on the common law rules defining the employer-employee relationship, and the difference between that relationship and an

[16] Business and Professions Code section 6148, subdivision (b), requires attorneys to have written fee agreements with their clients whenever the client's total expense, including fees, will foreseeably exceed $1,000. Because the statute requires a brief description of the client's and attorney's duties, such agreements ordinarily do no more than describe the subject of the representation and then a statement that "Attorney will provide those legal services reasonably required to represent Client" and "Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries." (State Bar of California, Sample Written Fee Agreement Forms (June 23, 2005) Form No. 1 at p. 13; Form No. 2 at p. 18; Form No. 3 at p. 22. See also Cal. Practice Guide: Professional Responsibility (The Rutter Group 2008) ch. 5, Form No. 5:M, Attorney-Client Fee Contract, at p. 5-162.)

independent contractor relationship, which is explicated in a rich body of case law, Kekoa never even mentions, let alone discusses, the rule and the case law in his opening brief; and the passing reference to the rule in his reply brief disingenuously attempts to evade its application.[17] Kekoa's position is simply that the relationship between the parties is so clearly that of attorney and client that—despite the control provision, which Kekoa largely ignores—it cannot be deemed merely an employment relationship.

It is important to emphasize that Kekoa has consistently adhered to the view (as has Sprague) that the employment relationship and the attorney-client relationship are *necessarily* mutually exclusive. That is, Kekoa has never maintained that there are circumstances in which an attorney providing legal assistance to his employer may in law be held liable to the employer for misfeasance committed while acting in a representative capacity, and such circumstances are present in this case. Because Kekoa has never raised that issue, we do not address it.[18]

The only legal issue presented by this appeal is the simple question whether, in granting judgment on the pleadings against Kekoa, the trial court erred in concluding that Kekoa engaged Sprague to assist him as an employee. We have no difficulty concluding that it did not. The trial court's determination that the parties' agreement established an employer-employee relationship, and its dismissal of Kekoa's cross-complaint on that basis, was—for the reasons earlier explained—clearly correct. For that reason, and because Kekoa does not coherently raise any other legal issue on this appeal, we shall affirm the judgment.

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[17] In his reply brief, Kekoa states simply that "each and every one" of the secondary factors indicative of an employment relationship "favors his cause," and that the principle that "where there is independent evidence that the principal has the right to control the manner and means of performing the services in question does not mean that a court is precluded from considering those factors." However, Kekoa provides absolutely no reason why we should even look to those factors given his unquestioned and legally unquestionable right under the contract to completely control Sprague's conduct.

[18] When Kekoa's failure to ever make this argument was noted at oral argument by a member of this panel, his counsel admitted the claim was never explicitly made but endeavored to persuade us it should be deemed implicit in the argument he did make. We are not persuaded.

II.

Sprague's Motion for Sanctions

A.

Sprague moves for sanctions against Kekoa and his appellate counsel under Code of Civil Procedure section 907 and rule 8.276(a). Section 907 states that, "[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." Rule 8.276(a) provides that "[o]n motion of a party or on its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal's determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules." We shall conclude that sanctions are warranted in this case for all four of the reasons set forth in the rule.

Flaherty, supra, 31 Cal.3d 637, sets forth two standards—one objective and the other subjective—to determine whether an appeal is "frivolous." "The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and therefore frivolous.' [Citations.]" (*Id.* at p. 649.) "The subjective standard looks to the motives of the appellant and his or her counsel" to determine whether the appeal was taken to harass the respondent or delay the judgment or for some other improper purpose. (*Ibid.*) The objective and subjective standards may be used independently or, as is often the case, together, with one providing evidence of the other.

Our inquiry whether this appeal and related pleadings in this court are "frivolous" within the meaning of *Flaherty*, and whether there are additional reasons to sanction Kekoa and his counsel, is divided into four parts explaining why: (1) we decline to determine whether this appeal is "frivolous" under the *objective* test; (2) it is "frivolous"

under the *subjective* test; (3) the writ petition and numerous motions filed by Kekoa in connection with the appeal are all objectively and subjectively "frivolous"; and (4) Kekoa's repeated placement of immaterial matters in the record and other violations of the Rules of Court are also sanctionable.

1. *We Decline to Decide Whether the Appeal is Objectively Frivolous*

Remarkably, Kekoa's lengthy briefs devote relatively little space to what we consider the single legal question presented; namely, the correctness of the trial court's ruling that the agreement between the parties was intended by the parties to create an employer-employee relationship. The few pages he spends on this issue wholly ignore the settled principle that the right of control determines the issue of employment or independent contractor. Kekoa never even cites, let alone discusses, any of the many cases relied upon by Sprague and the trial court. For the most part, Kekoa's briefs consist of accusations,[19] not legal argument, and they are unpersuasive.

Considering the comprehensiveness of the control provision of the parties' agreement and the clarity of the law that such a provision establishes an employment relationship, Kekoa's claim that Sprague cannot as a matter of law be deemed his employee is frivolous under the objective test set forth in *Flaherty, supra,* 31 Cal.3d 637. However, while we find it easy to conclude that no reasonable attorney could think this claim sustainable on the merits, an unusual aspect to the case persuades us to refrain from applying the objective test.

[19] To take just several examples, without much elucidation, Kekoa's briefs are replete with shotgun charges that the judgment below and award "are the product of patent judicial error, arbitrary and/or capricious action, bias and/or prejudice, act(s) without jurisdiction, violations of Kekoa's federal and California constitutional rights, abuse of discretion and/or violations of Kekoa's civil rights." According to Kekoa, the trial court "crafted, and applied solely to Kekoa, new law and procedure that, inter alia, undermine the attorney-client relationship, absolve attorneys of unethical conduct, greatly expand the scope of attorney's fees under Business and Professions Code section 6204(d) and open a Pandora's Box of opportunities for new forms of representative actions in California."

Although clearly unappreciated by the parties, the facts of this case implicate the complex question, rarely addressed by our courts, whether employer-employee and attorney-client relationships are necessarily mutually exclusive.[20] Due to the ambiguousness and possible dual nature of the relationship between the parties to this case, and due also to the dearth of case law on the issue, a reasonable attorney who conducted appropriate legal research might think an appeal of the judgment at least colorable on the theory that even if Sprague was an employee he also clearly acted as Kekoa's attorney and had the fiduciary and professional duties Kekoa alleged. The fact that Kekoa never claimed that an attorney-client relationship could exist concomitantly with an employment relationship does not mean a colorable argument could not have been fashioned. On the other hand, in evaluating the objective frivolousness of an appeal, a court cannot consider legal arguments that could have been raised but were not. For that reason, we believe this appeal could be deemed objectively frivolous. However, because the appeal is unquestionably frivolous under the subjective test set forth in *Flaherty*, we find it unnecessary to decide whether it is also objectively frivolous.

2. *The Appeal is "Frivolous" Under the Subjective Standard*

In assessing whether Kekoa was motivated to take this appeal by a desire to harass or delay, we think it appropriate to consider his conduct in the court below and also in the dissolution and related cases, because that behavior sheds light on Kekoa's motives in taking this appeal and reveals the ineffectuality of the sanctions imposed on Kekoa in some of those proceedings. (See *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th

[20] See, for example, our opinion in *Associated Indem. Corp. v. Indus*[*trial*] *Acc*[*ident*] *Com*[*mission*] (1943) 56 Cal.App.2d 804, which presented the question whether an attorney employed under a general retainer to provide both legal and consulting services was an "employee" within the meaning of the Workmen's Compensation Act. Because it was undisputed that the attorney retained the right to control his work while it was in progress, we held he was an independent contractor, not an employee, and annulled an award by the Industrial Accident Commission. We did not, however, decide and left open the question whether a relationship of employer and employee can exist when an attorney is employed to perform professional services for his employer and the employer reserves the right to control the work of the attorney. (*Id*. at p. 810.)

1759, which takes into account the failure of the order imposed in *In re Shieh* (1993) 17 Cal.App.4th 1154, to constrain the continuing vexatiousness of the same litigant.

We need not detail Kekoa's misconduct in the dissolution proceeding and related cases in great detail, as it is described in an opinion of Division Five describing one of the "numerous" orders sanctioning Kekoa in those cases in a total amount exceeding $200,000.[21] (*Sagonowsky v. Kekoa, supra,*. No. A113883, p. 9.) Among other penalties, Kekoa was sanctioned $30,000 under Family Code section 271 for making the dissolution process " 'far more' litigious than appropriate or necessary." (*Sagonowsky v. Kekoa, supra,* No. A113883, p. 5.) The conduct for which Kekoa was sanctioned consisted of excessive requests for unjustified continuances, repeated rejection of settlement proposals, refusals to propose terms of settlement, and also the filing of frivolous motions.

Significantly, Kekoa was sanctioned not just for unduly prolonging the dissolution proceeding, but also separately penalized in the amount of $50,000 based on the unusual finding that he "acted in a bad faith and *malicious* manner" in that proceeding. (Italics added.) Written findings and conclusions of Commissioner Slabach, which were thereafter approved by Judge Donald J. Sullivan, state that Kekoa "continues to overlitigate this case, and that rather than attempting to comply in good faith with the Court's temporary spousal support order, he has caused Petitioner to incur additional attorney's fees and expenses in responding to [his] ex parte application for an immediate stay of the temporary spousal support order and to respond to [his] motion to stay and to vacate, clarify or modify the Court's spousal support order. Rather than cooperating with Petitioner, [Kekoa] has chosen to escalate this litigation and to spend money on

[21] Kekoa's amended cross-complaint claims that "due to" Sprague's stipulation to Commissioner Slabach, which was allegedly negligent and a breach of the parties' agreement, "Kekoa was sanctioned the following amounts: $30,000, $40,000, $10,000, $162,000 (awarded as reimbursement attorney's fees during the misappropriation case) and $50,000 in sanctions." (In the original cross-complaint, Kekoa represented that he was sanctioned $212,000 in the "misappropriation case" alone.)

attorney's fees rather than use his available income to provide reasonable support to Petitioner as ordered by the Court."

Kekoa has similarly endeavored to complicate and prolong the present litigation. As in the dissolution case, Kekoa represented himself for almost a year from the date Sprague filed his complaint, and during that period conducted little or no discovery. After the court set a trial date, Kekoa hired new counsel (Michael Train Caldwell and Jonathan A. Bornstein) to make a request for a continuance. Arguing that "there has been no meaningful discovery conducted to date," new counsel (who never again appeared in the case, and seem to have been substituted in solely for the purpose of seeking the continuance) disingenuously represented that Kekoa "is a pro per party litigating against a licensed California attorney," and that Sprague "utilized his understanding of the law as a licensed attorney to deny [Kekoa] discoverable information necessary to the prosecution of [Kekoa's] case." After the first request was also denied, Kekoa hired another attorney (Martin Ruane) to file a second request for a continuance, which was based on rules 3.1332(c)(4) and 3.1332(c)(5).

Rule 3.1332(c)(4) states that the substitution of counsel provides grounds for granting a continuance, "but only where there is an affirmative showing that the substitution is required in the interests of justice." Kekoa's claim that the interests of justice would be served by the requested continuance was based on (1) reiteration of the unexplained claim of earlier counsel that Kekoa lacked the time necessary to conduct adequate discovery during the period in which he represented himself, and (2) the assertion that the approximately $200,000 in damages Sprague sought "would create a severe financial hardship on [Kekoa] if [Sprague] is successful." The trial court rejected these claims, doubtless because Kekoa never explained why he failed to conduct discovery during the considerable period in which he represented himself, nor why the damages Sprague sought would create a financial hardship, particularly in light of the fact that Kekoa and his wife then owned numerous valuable income producing properties and had a substantial net worth. (See *Sagonowsky v. Kekoa, supra,* No. A113883, at p. 2.)

Rule 3.1332(c)(5), upon which Kekoa also relied, provides that the addition of a new party provides grounds for a continuance if "[t]he new party has not had a reasonable opportunity to conduct discovery and prepare for trial" or "[t]he other parties" have not had that opportunity "in regard to the new party's involvement in the case." Kekoa stated that he intended to name a new party and claimed it "will also have a need to conduct discovery." Kekoa additionally represented that "this new party should have an insurance policy which would be applicable for the causes of action set forth in Kekoa's intended cross-complaint." These representations were also rejected, apparently because Kekoa never explained why he waited so long to file the cross-complaint nor even identified the putative "new party," and because of the legal irrelevance whether a party sought to be added is insured.

We think it also worth noting that Kekoa's many objections to assigned judicial officers may also be seen as attempts to harass and delay, and sometimes had that effect. Rarely does a reviewing court see such unremitting, vitriolic, and wholly unjustified attacks on the fairmindedness of judicial officers who have issued adverse rulings or merely indicated they were considering whether to do so. While Kekoa did not previously seek to disqualify the trial judge in this case, the Honorable Charlotte Woolard, he does so now. His opening brief asks not only that we reverse her ruling on his cross-complaint and remand for retrial but also "requests that Judge Woolard be disqualified pursuant to Code of Civil Procedure section 170.1(c)." The prospective disqualification of Judge Woolard is called for, Kekoa maintains, because her rulings against him are not only "patent[ly]" the product of "misguided sympathy or bias" and "apparent fraud," but comparable to the conduct of the judge who was, in *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, removed from office for willful misconduct in office and conduct prejudicial to the administration of justice. (The misconduct in *Geiler* consisted of brandishing a dildo in chambers, using the incident to

curtail a public defender's cross-examination, profanely and abusively reprimanding court employees, and bad faith interference in the attorney-client relationship.)[22]

Kekoa's charges against Judge Woolard, like those against Commissioner Slabach and members of this panel, and his motion for sanctions against Sprague, are emblematic of his tit-for-tat strategy. By constantly upping the ante, no matter the cost and unlikelihood of success on the merits, against all claims, no matter how merited, and by advancing his charges with such fervently self-righteous indignation and rancor, Kekoa seeks to intimidate into submission parties who cannot bear the financial and emotional costs of the war he wages.

Like his constant efforts to delay the dissolution proceeding and harass his ex-wife, and despite the mammoth sanctions imposed upon him for doing so, Kekoa repeated those efforts in this litigation. This appeal and the motions Kekoa made in connection therewith are but the latest examples.

Finally, we think it appropriate to point out that, as Kekoa must or should have known, it is highly unlikely he would have prevailed in this case even if Sprague's motion for judgment on the pleadings had not been granted and the causes of action in his cross-complaint had been presented to a jury. In order to prevail on his central claim that Sprague's stipulation to Commissioner Slabach's participation in the dissolution proceeding and unwillingness to thereafter seek her removal constituted breach of fiduciary duty and professional negligence, [23] Kekoa would have had to show not only

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[22] Attorney George appears to have been aware that the sarcastic and demeaning tone of many of his pleadings might give offense, but absolves Kekoa of responsibility. For example, in the writ petition—in which he maintains "that sarcasm has a place in advocacy, particularly where clear judicial bias and/or incompetence and/or attorney fraud causes tremendous hardship and significant loss and threatens even greater hardship and loss,"—George states that "[s]hould any member of this Court take offense at the tone of this submission or deem it excessive, the blame rests with Kekoa's counsel."

[23] In a copy of a declaration dated November 30, 2006, that he apparently filed in the dissolution case in support of his motion to be relieved as Kekoa's counsel, Sprague maintained that he refused to follow Kekoa's instructions to challenge Commissioner Slabach's participation in the case and/or her adverse rulings either because such efforts were time-barred or there was no factual basis for the challenge, and also because

that he directed Sprague not to make that stipulation but that Sprague's conduct was unjustified and caused him injury. The record before us provides reason to think Kekoa knows or should know that he could not make such showings.

In an opinion affirming the imposition of sanctions in the dissolution case, Division Five observed that "it strains credulity to suggest Mr. Sprague acted carelessly or inadvertently in signing the Stipulation on June 27[, 2007]" (*Sagonowsky v. Kekoa, supra,* No. A116818, p. 6), indicating its belief that Kekoa either proposed or agreed to the stipulation for strategic reasons. The decision of the bar association arbitrators, which too is part of our record, lends credence to Sprague's representations. As material, the arbitrators stated: "With Mr. Sprague as a staff attorney to support him, Mr. Kekoa embarked on a strategy where he retained total control over his legal shenanigans while he pursued questionable legal process against his ex-wife unimpaired by the ethical constraints that a reputable family law firm would no doubt have imposed on him. In short, it is believed that Mr. Kekoa knowingly got what he bargained for. He took a risk that he could harass his ex-wife and abuse the system and he failed."

Furthermore, even if Kekoa could show that in stipulating to Commissioner Slabach's participation Sprague defied his instructions, thereby breaching the control provision of the agreement, and even if Sprague's act constituted a breach of contract or torts, Kekoa could not recover damages without also establishing that the adverse rulings made by Commissioner Slabach would not also have been issued by the judicial officer who would otherwise have ruled. This showing would also be almost impossible for Kekoa to make, as he must or should have known.

The record persuades us Kekoa is not maintaining this appeal in the genuine belief he can eventually succeed in this case, but due to his desire to delay and harass.

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following Kekoa's instructions would require him to violate his duty under rules 3-200 and 3-700 of the Rules of Professional Conduct. For reasons difficult for us to fathom, Kekoa made an unexecuted copy of this declaration part of exhibit E to his opposition to Sprague's motion to have him declared a vexatious litigant that Kekoa filed in this court on October 16, 2009.

Accordingly, we conclude that this appeal is frivolous under the subjective standard described in *Flaherty*, *supra*, 31 Cal.3d 637.

3. *Kekoa's Writ Petition and Motions Were Frivolous*

Although we have declined to find Kekoa's appeal objectively frivolous, we have no problem concluding that his related petition for writ of supersedeas, two motions to sanction Sprague, three motions requesting that we disqualify ourselves and transfer this appeal to another division of this court, his request at oral argument of the appeal that we take judicial notice of recent proceedings in the dissolution case, and his request for a third extension of time to more fully oppose Sprague's motion to declare him a vexatious litigant, are all indisputably without merit and, in our view, taken for purposes of delay and harassment, and therefore independently sanctionable despite the fact that they pertain to an appeal not itself objectively frivolous. (*Dana Commercial Credit Corp. v. Ferns & Ferns* (2001) 90 Cal.App.4th 142, 147.) We start with the writ petition.

It is elemental that judicial power to issue the writ of supersedeas "should be sparingly employed and reserved for the exceptional situation." (*People ex rel. S.F. Bay, etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 537) The writ, which is utilized primarily in child custody cases and situations in which execution of the judgment may moot the appeal, is rarely granted where, as here, the matter on appeal is a money judgment. Indeed, a showing that the judgment debtor will go into bankruptcy is normally insufficient and the record suggests Kekoa is far from bankrupt. The sole purpose of the writ is to preserve appellate jurisdiction pending review of the appeal and a ruling on the merits. (*In re Christy L.* (1986) 187 Cal.App.3d 753, 758-759.) The writ is appropriate *only* where the fruits of a reversal would be irrevocably lost unless the status quo was maintained. (*Ibid*.; Code Civ. Proc., § 923.) Kekoa's 93-page writ petition (which was filed more than three months after the notice of appeal herein) made no such showing.

Kekoa asserted he was unable to post the bond necessary to secure a stay of the judgment in this case from the trial court because his ex-wife opposed his efforts in the dissolution case to permit the sale of one of the many properties in the $10 million

community estate. However, whether Kekoa has the ability to post an appeal bond seems to us irrelevant in light of the fact that Kekoa's petition is entirely bereft of any explanation how execution of the judgment in favor of Sprague could conceivably moot the present appeal, as required by rule 8.112(a)(3).

Additionally, Kekoa failed to seek a stay from the trial court, and a party seeking supersedeas must have exhausted all available trial court remedies to obtain a stay; that is, a writ of supersedeas may issue only if the stay was sought and denied by the trial court. (*Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 577.) Clearly, any reasonable attorney would know Kekoa's petition for writ of supersedeas is totally and completely devoid of merit. Sanctions may be imposed for the filing of a manifestly frivolous writ. (See, e.g., *Los Angeles County Dept. of Children etc. Services v. Superior Court* (1995) 37 Cal.App.4th 439. 456-457.)

So, too, was Kekoa's first motion for sanctions objectively frivolous. We initially denied that motion as untimely under rule 8.276(b)(1), which requires that a motion for sanctions be filed within 10 days after the appellant's reply brief is due. Kekoa sought reconsideration based on the claim that his motion was based on the frivolousness of the motion for sanctions filed by Sprague on May 1, 2009, and he could not reasonably be expected to file his own within the time prescribed by rule 8.276(b)(1), which must be deemed applicable only to sanctions for filing a frivolous appeal. However, Kekoa's initial motion for sanctions was not genuinely based on the asserted frivolousness of Sprague's motion for sanctions, as he claimed, but on the asserted frivolousness of Sprague's legal position throughout these proceedings that he was an employee, and the adoption of that view by the trial court. The timeliness of Kekoa's motion under rule 8.276(b)(1) is almost beside the point, because he has sought sanctions for conduct that is not sanctionable under any statute or rule of court. Insofar as his motion relates to Sprague's conduct in this court, Kekoa essentially requests that we sanction Sprague for filing what Kekoa considers a frivolous respondent's brief in support of a frivolous trial court ruling.

As Kekoa sees it, section 907 of the Code of Civil Procedure and rule 8.276 authorize sanctions on appeal not only for the filing of frivolous appeals, but also for making "frivolous" legal arguments at trial and, after they are "frivolously" adopted by the trial court, advancing them again in an appeal by the losing party. As it should not be necessary for us to say, neither section 907, rule 8.276, nor any other authority permits an appellant to move for sanctions against a respondent for defending a trial court ruling in his favor.

Furthermore, Kekoa's motion to sanction Sprague—which was undoubtedly calculated to respond to Sprague's motion to sanction him—raised substantive legal issues (Sprague's "standing" to sue for Blake's services, and the trial court's "subject matter jurisdiction" over claims for Blake's services) providing no basis upon which to sanction Sprague.

The motion for sanctions is totally devoid of merit and itself sanctionable. (*Dana Commercial Credit Corp. v. Ferns & Ferns, supra*, 90 Cal.App.4th at p. 147.)

The renewed request for permission to file a motion for sanctions against Sprague filed by Kekoa on October 16, 2009, is also frivolous. Kekoa's request for permission to file a second motion for sanctions is predicated on the asserted "baselessness" of Sprague's motion to declare Kekoa a vexatious litigant. As will later be discussed, the relief sought by Sprague is based in part on the reasoning of *In re Shieh*, *supra*, 17 Cal.App.4th 1154, which involved a vexatious litigant who, like Kekoa, was a licensed attorney. Kekoa maintains that Sprague's reliance on this case warrants sanctions because *In re Shieh* was improperly decided (and Sprague presumably knew or should have known this). According to Kekoa, the *Shieh* court "failed to consider and recognize . . . that legally sanctioning a relationship that permits an attorney to act as his/her client's puppet not only violates public policy but denigrates the legal profession; that while Shieh was apparently far from innocent, the ones that should have been punished in that case, if in fact proceedings on that appeal were vexatious, were Shieh's attorneys, who either did not even try to stop Shieh from shooting himself in the foot or who refused to withdraw as counsel for Shieh when they/he/she . . . were unable to convince Shieh to do

the right thing." All we need now say in response to this argument is that Sprague's reliance on *Shieh* would not be sanctionable even if we agreed—which, as will be seen, we do not—that *Shieh* was erroneously decided. The claim that reliance on judicial precedent is sanctionable behavior is not only frivolous but among the more bizarre claims advanced by Kekoa in this appeal.

Kekoa's repeated motions to disqualify this panel, based largely on erroneous legal theories and unjustified insinuations of unethical judicial conduct, are also frivolous.

As earlier explained, after Sprague moved for sanctions against him, we sent Kekoa the notice required by rule 8.276(d), which authorized him to respond to Sprague's motion. Kekoa answered instead with a counter-motion to sanction Sprague. When we denied his motion as untimely, Kekoa requested that we disqualify ourselves and transfer this appeal to another division of this court.

According to Kekoa, our disclosure of willingness to even entertain Sprague's motion for sanctions "before Mr. Kekoa had been afforded any opportunity to respond to Mr. Sprague's moving papers," demonstrates that we "had already decided the sanctions issue in violation of Mr. Kekoa's rights to due process and equal protection." The obvious flaw in this argument is that Kekoa could not have responded to Sprague's motion *unless* we sent him the notice required by rule 8.276(d), which he claims demonstrates our bias.

Rule 8.276(d) provides that opposition to a motion for sanctions "may not be filed" *except after notice from the court that it is considering imposing sanctions*. If, as Kekoa believes, the sending of a rule 8.276(d) letter demonstrates that the court has "already decided the sanctions issue," thereby demonstrating a bias against that person, compliance with rule 8.276(d) would be impossible. Kekoa's theory is absurd.

Nor is Kekoa's request that we disqualify ourselves supported by *Kaufman v. Court of Appeal, supra*, 31 Cal.3d 933, which adopts the federal rule that "each appellate judge decides whether the facts require recusal." (*Id*. at p. 939.) Furthermore, *Kaufman* was superseded by Canon 3(E)(4) of the California Code of Judicial Ethics, which was

enacted in 1996. Under that Canon, disqualification is appropriate only if an appellate justice "believes his or her recusal would further the interests of justice," or "doubts his or her capacity to be impartial," or "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." (Canon 3(E)(4)(a), (b), (c).)

The legal basis of Kekoa's first attempt to disqualify this panel and have this case transferred to another division is so manifestly devoid of merit as to render the motion objectively frivolous; and it is also subjectively frivolous because the motion seems to us clearly designed to delay final disposition of this case.

Kekoa's second motion to disqualify this panel (made after oral argument on September 15, 2009 as part of his written opposition to Sprague's motion to declare him a vexatious litigant) is based in part on the proposition that our "actions and statements at oral argument [on September 15, 2009] violated Code of Judicial [Ethics], Canons 1-4.12. As such conduct would lead '*a reasonable person aware of the facts [and the law to] doubt the justice's ability to be impartial'* and, in fact, to believe that this Panel is biased against Kekoa or his counsel or both Kekoa and his counsel, this Panel must recuse itself on this appeal. In this regard, if the Judiciary cannot be trusted to police itself and protect the public from judicial overreaching, bias or prejudice, or cannot be trusted to protect the public from unethical attorneys, it should be stripped of the former privilege and the latter obligation—if necessary, by an/a initiative referendum amending the California Constitution."

The "actions and statements" at oral argument on September 15, 2009 that Kekoa relies on to show bias is the knowledge members of this panel revealed about this case and the related dissolution case. According to Kekoa, our knowledge indicates that one or more members of this panel may have "conduct[ed] an independent investigation on their own or . . . consider[ed] undisclosed evidence or argument . . . that would amount to juror misconduct . . . ." Kekoa states that "if any member of the Panel has had direct or indirect contact with any judicial officer of the San Francisco Court, or even with any Justice of this Court who served on any panel handling any of the appeals at issue on this

motion or who may serve on any panel appeal assigned this appeal in the future, respecting any issue or matter raised by this appeal, Kekoa's counsel, on behalf of Kekoa and the general public, hereby demands that said judicial officers be identified for the record, and that the substance of any communications with said judicial officers be disclosed for the record, and that Kekoa be afforded the right to examine those judicial officers, under penalty of perjury . . . ."

The nature and style of these baseless challenges to the integrity of this court may well violate the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers" (Bus. & Prof. Code, § 6068, subd. (b)) and warrant discipline by the State Bar Association. (1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 500, pp. 620-621, citing *Ramirez v. State Bar* (1980) 28 Cal.3d 402; *Hogan v. State Bar* (1951) 36 Cal.2d 807; and *Peters v. State Bar* (1933) 219 Cal. 218.) Any further response by us to Kekoa's and his counsel's "demands" would accord them a level of dignity they do not deserve.

Suffice it for us to state that Kekoa's second motion to disqualify this panel is also objectively and subjectively frivolous.

Kekoa's third and final attempt to disqualify this panel is primarily based on the claim that our denial of his request for a third extension of time to amend his opposition to the motion to declare him a vexatious litigant is so egregiously unreasonable that it can only reflect personal bias against him. The asserted unreasonableness of our ruling is based on a manifestly erroneous reading of section 391 of the Code of Civil Procedure, the vexatious litigant statute.

As later described in more detail (see discussion, *post*, at pp. 42-45), Kekoa believes he cannot adequately defend himself against Sprague's motion to declare him a vexatious litigant without demonstrating that the eight unsuccessful legal proceedings Sprague claims he commenced in propria persona during the immediately preceding seven-year period were not "frivolous" within the meaning of *Flaherty, supra,* 31 Cal.3d 637. Kekoa maintains he cannot make this showing without examining the records of all of the eight prior "litigations" that Sprague relies upon, many of which have been

archived and are not readily available. By denying him a third extension of time, Kekoa says we have prevented him from demonstrating the baselessness of Sprague's motion, thereby demonstrating our bias against him. This argument is based on a misreading of the vexatious litigant statute.

The frivolousness of the eight "litigations" Sprague relies upon is irrelevant. All the vexatious litigant statute requires Sprague to show is that "[i]n the immediately preceding seven-year period [Kekoa] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in small claims court that have been . . . finally determined adversely to [Kekoa] . . . ." (Code Civ. Proc., § 391, subd. (b)(1).) Sprague need not show that any of the litigations he relies upon were frivolous, and his motion could not be defeated by any showing by Kekoa that they were not frivolous. Because Kekoa possesses at least as much relevant information as Sprague does about prior litigation he commenced, denial of a third extension of time therefore did not impair his ability to oppose Sprague's motion, nor did the ruling show bias on the part of this court.[24]

Because we believe any reasonable person would agree that the bases of Kekoa's third recusal request are meritless, and also because this final effort to disqualify the

[24] Kekoa's assertion that our denial of his request for a third extension of time was unreasonable and shows bias is also based on information about George's personal situation and the stress he was then experiencing. However, since this information was not disclosed to the court at the time the request for an extension of time was made, it is difficult to see how denial of the motion shows bias.

Kekoa also sees bias in the fact that, as he states in his declaration, "Justice Kline was willing to tutor Mr. Ormasa [Sprague's counsel] . . . on how to argue the pending motion [to declare him a vexatious litigant.]" There was no tutoring. As shown by the written transcript of oral argument Kekoa has provided and we made part of the record, the only pertinent statements Justice Kline made from the bench were that, at the time the court denied Sprague's July 30, 2008 motion to declare Kekoa a vexatious litigant, "my colleagues and I were not nearly as familiar with these proceedings as we have since become," because the appellate record had not been filed at the time Sprague made his motion. Justice Kline also noted that the prior motion did not rely on subdivision (b)(3) of section 391 of the Code of Civil Procedure; but we do not declare Kekoa a vexatious litigant under that provision.

panel and transfer this appeal to another Division of this court was designed to harass and delay, we conclude that Kekoa's third motion to disqualify the members of this panel is also objectively and subjectively frivolous.

Finally, Kekoa's request, filed on the day of oral argument on the appeal, that we take judicial notice of recent proceedings in the dissolution case is also frivolous. Putting aside the belatedness of this request, the material sought to be noticed is so obviously irrelevant to the legal issues this case presents (see discussion, *ante*, at p. 9, fn. 6) that no reasonable attorney could harbor any hope it would be granted.

4. *Kekoa's Repeated Placement of Immaterial Matters in the Record and Other Violations of the Rules of Court Are Also Sanctionable*

Rule 8.276(a) authorizes the imposition of sanctions for, among other things, including in the record matters that are not reasonably material to determination of the appeal and for violating the Rules of Court. We have already noted that Kekoa's briefs and other pleadings, and the many other communications he has faxed or sent directly to the members of this panel, which are voluminous, include exhibits containing matters never presented to the trial court or properly made a part of the appellate record, and are largely irrelevant.

Kekoa's justifications for ignoring the Rules of Court are all empty. To take just one example, an exhibit to his opening brief containing a copy of an e-mail he received from Sprague prior to the time the parties entered into the agreement here at issue. Kekoa's response to the portion of Sprague's respondent's brief complaining about this exhibit (and Kekoa's repeated references to other matters not in the appellate record) without having moved to augment the record, is worthy of note. Kekoa first points out that, if the exhibit was "truly immaterial, Sprague would not waste one word [on it] in his Respondent's Brief." Kekoa then proceeds to advance a *constitutional* right to attach to his brief a matter not before the trial court without having to move to augment the record, relying on article VI, section 11, of the California Constitution [describing the appellate jurisdiction of the courts of appeal], and a statutory right to do so under Code of Civil Procedure section 909 [providing that in non-jury cases reviewing courts "may make

factual determinations contrary . . . to those made by the trial court [, which] may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court"]. Kekoa claims he has this constitutional and statutory right because "[h]ere, the trial court precluded the jury from considering a number of factual issues raised on this appeal, violating Kekoa's constitutional rights to due process and a jury trial, which constitutional violations this Court should remedy by considering all evidence now before it and any additional evidence it deems necessary for a proper resolution of the issues before it." This argument, like many of his other arguments (see, e.g., that described, *ante*, at p. 8, fn. 4) is meritless.

The Rules of Court do not permit a party to attach to a brief any materials (other than relevant local, state, or federal statutes and regulations that are not readily accessible) that are not "in the appellate record" (rule 8.204(d)), and violation of the rules, which infringe no constitutional right, are sanctionable; and this is so even if the appeal was not frivolous or taken solely for the purpose of harassment or delay. (*Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566, 570.)

For the foregoing reasons, we conclude that Kekoa's appeal is subjectively frivolous and taken in bad faith for purposes of harassment or delay. We also conclude that Kekoa's writ petition, motions to sanction Sprague, and repeated requests that we disqualify ourselves and transfer this appeal to another division of this court, are all totally and completely devoid of merit *and* initiated in bad faith for purposes of harassment or delay and therefore objectively and subjectively frivolous under *Flaherty, supra*, 31 Cal.3d at pages 649-650. Sanctions are additionally warranted because Kekoa and George have sought to introduce numerous matters not material to the determination of this appeal and otherwise repeatedly violated the Rules of Court.

Thus, we turn to the amount of sanctions it is appropriate to impose.

B.

The amount of sanctions should bear "some rational relationship to the circumstances of the parties" as well as the purposes of Code of Civil Procedure

section 907. (*Hersch v. Citizens Savings & Loan Assn*. (1983) 146 Cal.App.3d 1002, 1013.) The factor most pertinent to this case, Sprague maintains, is the failure of past sanctions to alter Kekoa's misuse of the courts. (See, e.g., *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 95; *Papadakis v. Zelis* (1992) 8 Cal.App.4th 1146, 1150; *Simonian v. Patterson* (1994) 27 Cal.App.4th 773, 787.) He emphasizes that though Kekoa has been sanctioned more than $200,000 for misconduct, including the filing of at least one frivolous pleading, in the case from which this one derives, such unusually high sanctions have failed to change his behavior. Sprague maintains that, given Kekoa's personal wealth (which he calculates at $5 million, or half of the value of the community estate at the time of the dissolution proceeding), only a large amount of sanctions will have a deterrent effect, which is the purpose of imposing sanctions under section 907 and rule 8.276. (See *Bank of California v. Varakin* (1990) 216 Cal.App.3d 1630, 1638 [purpose of predecessor rule is " '*discouragement of like conduct in the future*' "].) Given that Kekoa has not challenged Sprague's claim and other indications in the record that he owns a considerable amount of valuable real property,[25] we agree.

We also think it appropriate to sanction Armen L. George, Kekoa's attorney on this appeal, despite the fact that so far as we know he has not previously been sanctioned. Given Kekoa's direct personal involvement in virtually all of the litigation he has commenced and his apparent disdain for the advice of counsel (which is among the reasons he was sanctioned under Family Code section 271 in the dissolution proceeding), and his insistence on the control provision of the agreement with Sprague, it is difficult to think the taking of this appeal was not primarily Kekoa's decision or that Kekoa did not exert considerable control over the manner in which his appeal was prosecuted. Nevertheless, an attorney is not a potted plant. When, as in this case, counsel is representing a client with a history of avoiding his obligations who has been repeatedly sanctioned for such conduct, it is especially important to remember that " '[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client.

[25] At oral argument on November 17, 2009, George stated that the value of Kekoa's interest in the community estate is $5 million.

[Citation.] As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. [Citation.] Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client" (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 520, quoting *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103; Cal. Rules of Prof. Conduct, rule 3-200), as apparently did several attorneys who represented Kekoa in this case and in the dissolution proceeding.

The meritlessness of Kekoa's petition for writ of supersedeas, motions for sanctions, motions requesting our recusal and other relief, and Kekoa's violations of many Rules of Court, also persuade us to separately sanction George. The petition, motions and other requests were not only objectively frivolous but seem to us also designed to cause unnecessary delay and impose additional expense on Sprague. George's violations of the Rules of Court also caused delay because they made it far more difficult to process this appeal than would otherwise have been the case.

Additionally, the prolixity of George's briefs and other papers, the confounding digressions he constantly embarks upon, the enormous amount of irrelevant material he has placed in the record, and his many failures to conform to the Rules of Court have materially obstructed and prolonged our processing of this appeal, and prejudiced the interests of parties to other appeals pending in this court.

The award of sanctions Sprague requests are not to recover attorney fees reasonably incurred by him on this appeal, which will hereafter be determined by the trial court, but "damages." (Code Civ. Proc., § 907.) (He discloses the amount of fees he has incurred in this appeal presumably because it is a factor that may be considered in measuring an appropriate amount of the damages he believes warranted.) Such sanctions are recoverable by a respondent where, as here, an appeal and related proceedings have been deemed dilatory and frivolous, since the sanctions amount is not limited to the

attorney fees incurred by the opposing party. (Eisenberg et al, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 11.124.1, p. 11-50; see also *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, 267-268.) As indicated, "[t]here are no fixed guidelines for measuring an appropriate amount of sanctions. Generally, the amount should reflect what is necessary to redress the 'undue burden' a frivolous appeal imposes on the legal system and respondent and to deter the same type of conduct in the future." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 11:135, p. 11-55, citing *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 33; *In re Marriage of Stich* (1985) 169 Cal.App.3d 64, 78; *Hersch v. Citizens Savings & Loan Assn, supra,* 146 Cal.App.3d 1002, 1013.) The factors that may be considered in setting the amount of sanctions include the appellant's net worth (*Bank of California v. Varakin, supra,* 216 Cal.App.3d at p. 1640; *In re Marriage of Stich, supra*, 169 Cal.App.3d at p. 78) the need for "discourage[ment of] like conduct in the future" (*Pierotti v. Torian, supra,* 81 Cal.App.4th at pp. 34-35), and the lack of any discernible deterrent effect of any previous sanction order (*Papadakis v. Zelis, supra,* 8 Cal.App.4th at p. 1150).

The cost to the taxpayers of the judicial processing of the appeal is also a relevant consideration. Since the decision in *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 17 (*Finnie*), sanctions—based on "the cost to the taxpayers to process an average civil appeal" (*id*. at pp. 17-18)—have often been made payable not only to the respondent, to compensate for the expense he or she may have incurred as a result of a frivolous appeal, but also to the court in consideration of the expense and inconvenience to it and, derivatively, the taxpayers. (See, e.g., *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 102-103.) " ' "Other appellate parties, many of whom wait years for a resolution of bona fide disputes, are prejudiced by the useless diversion of this court's attention. [Citation.] In the same vein, an appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources. [Citations.] Accordingly, an appropriate measure of sanctions should . . . compensate the government for its expenses in processing, reviewing and deciding a frivolous appeal. [Citations.]" [Citation.]' "

(*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1433; accord, *Pierotti v. Torian, supra,* 81 Cal.App.4th at p. 35.)

In 1988, when *Finnie* was decided, the cost in this appellate district of processing an ordinary civil appeal was determined to be approximately $2,324 (*Finnie, supra,* 199 Cal.App.3d at p. 17.) The cost of processing such an appeal in the Second Appellate District in 2008 was calculated to be approximately $8,500 (*In re Marriage of Gong & Kwong, supra,* 163 Cal.App.4th at p. 520), and we believe the present cost of processing such an appeal in this court is now approximately the same.

In light of the foregoing considerations, we conclude that Sprague is entitled to sanctions in the amount of $10,000, of which $7,500 (75 percent) shall be payable by Kekoa and $2,500 (25 percent) shall be payable by George. In fixing this amount, we have taken into account the frivolousness of this appeal and the extent to which Kekoa has unnecessarily complicated and prolonged it, and Kekoa's personal wealth; however, we have also taken into account that, as a result of our affirmance of the judgment below, Sprague will be entitled to seek reasonable attorney fees incurred in defending against this appeal from the trial court, and that Kekoa and George will also be directed to pay sanctions to this court.

We conclude that additional sanctions in the amount of $25,500 should be made payable to this court, of which Kekoa shall pay $19,125 (75 percent) and George shall pay $6,375 (25 percent). In fixing the total amount of sanctions payable to the court, we have determined that the conduct of Kekoa and George described in this opinion has made the processing of this appeal three times more difficult and time consuming, and three times as costly, as the processing of an average civil appeal (i.e., $8,500).

Finally, we turn to the remaining question whether Kekoa should be declared a vexatious litigant.

III.

Kekoa is a Vexatious Litigant

Sprague's motion to declare Kekoa a vexatious litigant is based on subdivisions (b)(1) and (b)(3) of section 391 of the Code of Civil Procedure. As earlier

noted, subdivision (b)(1) states that a litigant is vexatious if "[i]n the immediately preceding seven-year period [he or she] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person . . . .". Subdivision (b)(3) provides that a litigant may also be declared vexatious if, "[i]n any litigation while acting in propria persona, [he] repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or intended to cause unnecessary delay." Section 391, subdivision (a), defines "[l]itigation" as "any civil action or proceeding, commenced, maintained or pending in any state or federal court." Although the statute does not specifically say so, "litigation" has been judicially deemed to include a writ proceeding. (*In re R.H.* (2009) 170 Cal.App.4th 678, 691; *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1219; but see *Mahdavi v. Superior Court* (2008) 166 Cal.App.4th 32, 37.)

Before turning to the relevant facts, it is necessary to address Kekoa's claim that, for constitutional and other reasons, he cannot be declared a vexatious litigant.

Kekoa's constitutional claim is that "the Legislature's vexatious litigant scheme would, as applied to Kekoa, effectively preclude [him] from practicing law, rendering it unconstitutionally overbroad" and declaring him a vexatious litigant "would also de facto amount to disbarment, which this Court lacks jurisdiction to do." Kekoa's failure to cite any case or other authority in support of this argument is unsurprising, as California courts have repeatedly upheld the vexatious litigant statute against a variety of constitutional challenges (see, e.g., *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, cert. den. 522 U.S. 937; *In re Whitaker* (1992) 6 Cal.App.4th 54; *Muller v. Tanner* (1969) 2 Cal.App.3d 445; *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521), and the theory that the statute is "constitutionally overbroad" has been rejected by a federal district court in a decision affirmed by the Ninth Circuit (*Wolfe v. George* (N.D. Cal. 2005) 385 F.Supp.2d 1004, aff'd. 486 F.3d 1120).

Although Kekoa's opposition to the motion to declare him a vexatious litigant is hardly clear on the point, it seems to us from oral argument that his constitutional

contention is similar to arguments advanced in *Wolfgram v. Wells Fargo Bank, supra,* 53 Cal.App.4th 43, and *Wolfe v. George, supra,* 385 F.Supp.2d 1004; namely, that a merely unsuccessful but nevertheless colorable—i.e., nonfrivolous—action should not "count" as one of the underlying actions supporting a finding of vexatiousness, because Code of Civil Procedure section 391 would otherwise prohibit or encumber constitutionally protected conduct. As the reasons for rejecting this claim are more than adequately set forth in the opinions in *Wolfgram* and *Wolfe v. George*, we decline to set them forth again here.[26]

Kekoa also suggests that declaring him to be a vexatious litigant "would violate the Americans with Disabilities Act [(ADA)]." This theory is seemingly based on the claim that the financial difficulties Kekoa experienced as a result of the divorce proceedings exacerbated a pre-existing "mental disability" and that the ADA therefore bars application to him of the vexatious litigant statute."[27] We decline to address this issue even indulging the dubious assumption it is seriously being advanced. In a footnote

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[26] Kekoa also fails to explain why declaring him a vexatious litigant would bar or otherwise encumber his representation of others not themselves vexatious litigants and therefore "de facto amount to disbarment." Our declaration that Kekoa is a vexatious litigant means that he may not file any new litigation in the courts of this state without a prefiling order *only in litigation in which he is himself a party.*

[27] Kekoa states that the rulings in the divorce proceeding "deprived him of his assets, deprived him of sufficient funds to pay for the services of counsel, and deprived him even of sufficient funds to meet his day-to-day obligations as well as the obligations imposed on him by the Superior Court, all of which acts of deprivation by the Superior Court served to magnify the debilitating stress Kekoa was then experiencing and continues to experience to this day, causing his mental health to deteriorate further, impairing his ability to represent himself." Kekoa appears to rely also on a February 4, 2008, "Statement of Decision on the Bifurcated Issue of Respondent's Disability [CCP § 632]" in the divorce proceeding in which (in reliance on psychiatric opinions that Kekoa was then, among other things, "very obsessive," "agitated to manic," and "depressed and anxious" and that these conditions require drugs unacceptable for use by a pilot) the trial court found that Kekoa "has been emotionally, psychologically, and/or mentally disabled from engaging in his normal occupation as an airline transport pilot for United Airlines, starting on or about November 1, 2005, with such disability continuing through the present and which will likely continue into the foreseeable future."

to his opposition to the motion to declare him a vexatious litigant, Kekoa allows that "[t]his argument merely reflects a draft of a stream of thought." Though Kekoa's opposition was filed after he was twice granted an extension of time, his counsel states that he "has not had time to research the applicability of the ADA on state court proceedings [but] reserves the right to make this argument." We deem the argument waived.

Appellant also claims that on April 12, 2007, during the divorce proceedings, San Francisco Superior Court Judge Donald J. Sullivan issued an order denying Kekoa's wife's motion to declare him a vexatious litigant and that "[a]ccordingly, as a matter of law, Kekoa cannot be deemed a vexatious litigant [by this court]." We have no reason to think the grounds for the motion Judge Sullivan denied were the same as those now relied upon by Sprague, and doubt that is the case. Kekoa does not direct us to any authority for the proposition that we may not declare Kekoa a vexatious litigant because a trial judge refused to do so in another case.

Thus, we turn to the merits of Sprague's request that we declare Kekoa a vexatious litigant.

Sprague's renewed motion for an order determining Kekoa to be a vexatious litigant and requiring a prefiling order and the posting of security, includes copies of docket sheets and rulings in the following eight prior unsuccessful "litigations" in which Kekoa represented himself in propria persona:

(1) *Kekoa v. Superior Court* (*Sagonowsky*) Case No. A112789 (Petition for Writ of Mandate and Request for Stay, filed in Court of Appeal, 1st App. Dist., Div. 5, on January 27, 2006, and denied on February 2, 2006);

(2) *Kekoa v. Superior Court* (*Sagonowsky*), Case No. A115882 (Petition for Writ of Mandate/Prohibition and Request for Stay, filed in Court of Appeal, 1st App. Dist., Div. 5, on November 17, 2006, and denied on November 21, 2006; Petition for Review filed in Supreme Court, Case No. S148281 (see following));

(3) *Kekoa v. Superior Court* (*Sagonowsky*), Case No. S148281 (Petition for Review and Request for Stay, filed in Supreme Court on November 27, 2006, and denied on November 29, 2006);

(4) *Kekoa v. Superior Court* (*Sagonowsky*) Case No. A116345 (Petition for Writ of Mandate/Prohibition and Request for Stay, filed in Court of Appeal, 1st App. Dist., Div. 5, on January 8, 2007, and denied on February 8, 2007);

(5) *Sagonowsky v. Kekoa*, Case No. A116818 (Notice of Appeal lodged/received in Court of Appeal, 1st App. Dist., Div. 5, on February 21, 2007, opinion affirming award of sanctions against Kekoa filed on October 26, 2007);

(6) *Accusation of Kekoa Against Attorney*, Case No. S151251 (Petition/Accusation, filed in Supreme Court on March 19, 2007, and Order Denying Petition/Accusation filed on May 9, 2007);

(7) *Kekoa v. Superior Court* (*Sagonowsky*), Case No. A122804 (Petition for Writ of Mandate, filed in Court of Appeal, 1st App. Dist., Div. 5, on September 29, 2008, and Order denying Petition ("for failure to provide a record sufficient to enable informed appellate review") filed on October 2, 2008); and

(8) *Kekoa v. Superior Court* (*Sagonowsky*), Case No. A124310 (Petition for Writ of Mandate filed in Court of Appeal, 1st App. Dist., Div. 5, on March 16, 2009, and Order Denying Petition (and noting incompleteness of record provided) filed on March 18, 2009).

Kekoa does not deny that writ proceedings constitute "litigation" within the meaning of section 391 of the Code of Civil Procedure (*In re R.H., supra*, 170 Cal.App.4th at p. 691; *McColm v. Westwood Park Assn., supra*, 62 Cal.App.4th at p. 1219), nor does he deny that each "litigation" was maintained by him in propria persona other than in a small claims court during the immediately preceding seven-year period and finally determined adversely to him.

Kekoa's argument is that his filing of these "litigations" cannot be deemed "vexatious" because the adverse rulings were all *erroneous.* Referring to claims he advanced in the proceedings at issue, Kekoa maintains he "was right in appealing

Commissioner Slabach's denial of Sprague's motion for relief on the pro tem stipulation"; "right in challenging Commissioner Slabach for bias"; "right in challenging what Commissioner Slabach stated she would do on November 27, 2006, and, as well, the outcome of the proceedings on November 27, 2006"; "right in challenging Judge Sullivan's disqualification"; and he had "a right to complain about [his wife's attorney's] refusal to return privileged documents as well as his subsequent publication of those documents." (Somewhat gratuitously, Kekoa also maintains he is also "right on all other issues raised *by this appeal*.") (Italics added.) Finally, Kekoa explains, "imperfectly prosecuted does not mean vexatious/frivolous." This novel argument is meritless.

As previously explained, it is unnecessary for Sprague to show that the litigations he relies upon were vexatious or frivolous. All he needs to show is that at least five of the eight "litigation[s]" he commenced "[i]n the immediately preceding seven-year period," were "maintained [by Kekoa] in propria persona . . . other than in a small claims court, [and] finally determined adversely to [Kekoa]." (Code Civ. Proc., § 391, subd. (b)(1).) As indicated, Kekoa does not claim Sprague has failed to satisfy the statutory requirements and therefore concedes they have been satisfied.

This does not, however, end our analysis.

The eight prior proceedings Sprague relies upon do not include all of the "litigation" Kekoa has commenced in the immediately preceding seven years, because some of it was filed in Kekoa's behalf by counsel, not in propria persona.

We believe that in determining whether Kekoa is a vexatious litigant pursuant to subdivision (b)(3) of section 391, we could consider the unsuccessful writ petition and motions Kekoa filed in the dissolution proceeding despite the fact that they were filed in his behalf by counsel.

The vexatious litigant statute's differentiation between litigants represented by counsel and those appearing in propria persona "reflects the reality that a lawyer is often the best judge of the merits of a proposed suit. Of course, some attorneys allow themselves to be used as puppets by their clients, but such abuse can be remedied. The vexatious litigant can be barred from court even if he uses a 'strawman' attorney.

[Citation.]" (*Wolfgram v. Wells Fargo Bank, supra*, 53 Cal.App.4th at p. 58.) It has been held, however, that a litigant sought to be declared a vexatious litigant "who does not engage attorneys as neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters on behalf of a client . . . but to serve as mere puppets" may be prohibited from filing any new litigation in the courts of this state, "*whether in propria persona or through an attorney*." (*In re Shieh, supra*, 17 Cal.App.4th 1154, 1167, italics added.) The fact that Kekoa was sequentially represented at trial in the dissolution action by numerous attorneys before Sprague, all of whom either terminated their representation of him or were discharged by Kekoa, and the highly unusual control provision Kekoa insisted be made a part of his agreement with Sprague, strongly suggest Kekoa "does not engage attorneys as neutral assessors of his claims" but as "mere puppets," at least until, realizing their limited role, they refused to submit to such treatment and unilaterally terminated their representation of Kekoa or were discharged by him, in which case Kekoa finds new counsel.

Because, as we have said, the purpose for which Kekoa appears to engage counsel may reasonably be considered an attempt to evade application of the vexatious litigant statute, we believe we could include the unsuccessful writ petition and motions filed in behalf of Kekoa by counsel in the trial court proceedings in the dissolution case as bases upon which to declare him a vexatious litigant. We do not do so only because it is unnecessary. However, the reasoning of *In re Shieh*, which was also adopted in *Say & Say, Inc. v. Ebershoff, supra*, 20 Cal.App.4th 1759, 1769-1770, persuades us that it is also appropriate in this case to order that, like Shieh, Kekoa may not file any new litigation in the courts of this state in which he is a party, whether in propria persona or through an attorney, without first obtaining leave of the presiding judge of the court in which he proposes to file the litigation.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Sprague.

As sanctions for bringing and unnecessarily prolonging this frivolous appeal Kekoa and George shall pay Sprague $10,000; Kekoa shall pay 75 percent of that amount, or $7,500, and George shall pay 25 percent of that amount, or $2,500.

As additional sanctions for bringing and unnecessarily prolonging this frivolous appeal, Kekoa and George shall pay this court $25,500 to compensate it for costs incurred in processing this frivolous appeal; Kekoa shall pay 75 percent of that amount, or $19,125, and George shall pay 25 percent of that amount, or $6,375.

Curtis Kekoa, Jr. is a vexatious litigant and as such is prohibited from filing any new litigation in which he is a party in the courts of California without approval of the presiding judge of the court in which he proposes to file it, whether such litigation is filed by Kekoa in propria persona or through an attorney.

All payments due Sprague and the court must be made in full no later than 10 days after the remittitur is filed herein. Payments due the court must be sent to the Clerk/Administrator of the Court of Appeal.

This opinion constitutes a written statement of our reasons for imposing sanctions. (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 313.) Pursuant to section 6086.7, subdivision (a)(3), of the Business and Professions Code, upon the issuance of the remittitur, the Clerk/Administrator is directed to send a copy of this opinion to the State Bar of California.

Pursuant to Code of Civil Procedure section 391.7, subdivision (e), upon the issuance of the remittitur, the Clerk/Administrator of the Court of Appeal is directed to send a copy of this opinion and a conforming Judicial Council MC-700 form to the Judicial Council.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.